



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

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Office of West Virginia  
Secretary Of State

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**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL  
RULE**

AGENCY: Coal Mine Health And Safety TITLE-SERIES: 36-08

RULE TYPE: Legislative Exempt Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: THE RIGHT OF A MINER TO REFUSE TO  
OPERATE ALLEGED UNSAFE EQUIPMENT

CITE STATUTORY AUTHORITY: W. Va. Code §22A-6-4

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

April 6, 2020

**BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.**

**Yes**

**Wesley H White -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.**

TITLE 36  
LEGISLATIVE RULE  
BOARD OF COAL MINE HEALTH AND SAFETY  
  
SERIES 8  
THE RIGHT OF A MINER TO REFUSE  
TO OPERATE ALLEGED UNSAFE EQUIPMENT

**§36-8-1. General.**

1.1. Scope. -- Rules and regulations governing the right of a miner to refuse to operate alleged unsafe equipment.

1.2. Authority. -- W. Va. Code §22A-6-4.

1.3. Filing Date. -- January 7, 2020.

1.4. Effective Date. -- April 6, 2020.

**§36-8-2. Definitions.**

2.1. As used in this series:

2.1.1. Unsafe Equipment: The term “Unsafe Equipment” shall mean any equipment designed to be operated by a miner that has a defect which is covered by state law, or rule or regulation, and that creates a condition which involves a potential hazard that could reasonably be expected to cause a miner in the vicinity to be placed in danger of injury or death.

2.1.2. Safety representative: The term “Safety Representative” shall mean any safety representative of the miners at the mine affected.

**§36-8-3. No Miner Shall Be Required To Operate Unsafe Equipment.**

3.1. Miner's procedure when equipment is believed to be unsafe-When a miner believes the equipment he or she is operating, or is assigned to operate, is unsafe, the miner shall cease or refuse to operate the alleged unsafe equipment and promptly inform his or her immediate supervisor as to the identity of the alleged unsafe equipment and the particular alleged defect causing the equipment to be unsafe.

**§36-8-4. Equipment Examination: Immediate Supervisor-Miner.**

4.1. Prior to the alleged unsafe equipment being placed back into operation after a miner has alleged it to be unsafe, the immediate supervisor shall examine, or have examined by maintenance personnel, the alleged unsafe equipment with regard to each alleged defect noted by the miner. If the alleged defects are corrected the equipment may be placed back into operation.

**§36-8-5. Dispute Procedures: Immediate Supervisor-Miner.**

5.1. When the immediate supervisor fails to have the alleged defects corrected, the alleged unsafe

equipment may be parked in a manner that will allow the movement of other equipment; and the alleged unsafe equipment shall be de-energized, locked-out, and suitably tagged so as to keep the alleged unsafe equipment from being operated by any person.

5.2. No miner shall be discriminated against for refusing to operate alleged unsafe equipment.

#### **§36-8-6. Operator's Procedure If Dispute Remains Unsettled.**

6.1. If the allegations of the miner are disputed, the immediate supervisor shall notify at least one safety representative and a maintenance foreman, who shall inspect and/or test the alleged unsafe equipment within four (4) hours after notification to determine if the alleged defect exists. If the safety representative and the maintenance foreman find that the alleged defect does exist, the defect shall be corrected before the equipment is placed back into operation; if no defect is found, the equipment can be placed back into operation.

6.2. If the safety representative and the maintenance foreman disagree as to the alleged defect, they shall reduce to writing in detail the results of their inspection and/or test of the alleged unsafe equipment on a form, and in the manner, prescribed by the Director of the Office of Miners' Health, Safety and Training. The form shall contain at least the date and time of the inspection and/or test, description and location of the alleged unsafe equipment and the detailed results of the inspection and/or test.

#### **§36-8-7. Inspection: Office of Miners' Health, Safety and Training.**

7.1. At the conclusion of the steps outlined in Sections 4, 5 and 6 of this Series, the operator or his representative shall immediately notify the Director or the authorized representative requesting an investigation of his allegations of unsafe equipment. Upon receiving a request to investigate from an operator or his representative, the Director or his authorized representative shall immediately inform the operator when an inspection of the alleged unsafe equipment can be made by the Director of the Office of Miners' Health, Safety and Training: *Provided*, That such investigation shall be started within twenty-four (24) hours after the Office of Miners' Health, Safety and Training is requested to investigate. The operator or his representative shall give notice of the investigation time and place to the immediate supervisor and the miner involved in the dispute. The miner shall be given reasonable time to notify his or her safety representative, if he or she so chooses, in order that they may participate in the inspection.

7.2. A qualified authorized representative of the Director shall be at the place set for inspection at the time designated in order to conduct an investigation of the alleged unsafe equipment. Prior to inspecting the alleged unsafe equipment, the authorized representative of the Director shall read the form required to be completed in Section 6.2 of this Series. The authorized representative of the Director shall inspect and/or test the alleged unsafe equipment and enter the results thereof on a form and, in the manner, prescribed by the Director. The authorized representative's conclusions as to whether or not the equipment was "unsafe equipment" shall be entered on the form, along with the reasons for such conclusion. At the conclusion of the investigation, the authorized representative of the Director shall discuss the results of the investigation with, and in the presence of, the miner, the miner's safety representative if the miner so chooses, the immediate supervisor, the maintenance personnel involved in the dispute, the mine foreman and/or superintendent.

7.3. If the authorized representative of the Director finds the equipment involved in the dispute to have a defect which is covered by state law, or rule or regulation, appropriate notices and/or orders shall be issued; which notices and/or orders shall be complied with prior to the subject equipment being placed back

into operation.

**§36-8-8. Decision By The Director Or The Deputy Director As To Whether Or Not The Miner Acted With Good Faith And With Good Cause.**

8.1. When the operator believes the miner involved in the dispute acted in bad faith and without good cause, the operator may make application to the Director charging the miner with having acted in bad faith and without good cause and requesting a determination of such charge: *Provided*, That such charge is made within five (5) days of the alleged dispute.

8.2. The operator's application charging the miner shall be mailed by certified mail to the Director, the charged miner, and the safety representative, if any.

8.3. Upon receiving a charge from an operator, the Director shall promptly cause such investigation as he deems appropriate and schedule a hearing within twenty (20) days after receiving the charge, allowing the operator and the miner an opportunity to be heard.

8.3.1. Notice of hearing; Contents of notice.

8.3.1.a. Unless waived by the operator and the miner involved in the dispute, no hearing shall be conducted under Section 8 of this Series unless the miner and operator shall have received at least ten (10) days' written notice.

8.3.1.b. Each written notice of the hearing shall contain the date, time and place of the hearing and a short and plain statement of matters which are to be the subject of or asserted at the hearing. Such notice shall be given by certified mail.

8.3.2. Date, time and place of hearing. The date, time and place of the hearing shall be determined by the Director.

8.3.3. Representation at hearings. The miner involved in the dispute may represent himself, be represented by a safety representative or be represented by an attorney duly authorized to practice law in West Virginia. The operator may be represented by a full-time employee or an attorney duly authorized to practice law in West Virginia.

8.3.4. Applicability of Administrative Procedures Act. All of the pertinent provisions of W. Va. Code §§29A-5-1 *et seq.*, shall apply to and govern hearings conducted under Section 8 of this Series with like effect as if the provisions of W. Va. Code §§29A-5-1 *et seq.*, were set forth herein. If any provision of these rules of practice and procedure contained in Section 8 of this Series are inconsistent with any pertinent provisions of W. Va. Code §§29A-5-1 *et seq.*, the provisions of W. Va. Code §§29A-5-1 *et seq.*, shall control.

8.3.5. Waiver of evidentiary presentation.

8.3.5.a. Any party who desires to submit written pleadings, comments or information in lieu of an evidentiary hearing may submit such documents prior to the hearing date, for the Director's or Deputy Director's, as the case may be, consideration in the matter in the event hearing is waived as provided in subsection (e) (2) of this Section.

8.3.5.b. Parties entitled to an evidentiary hearing may waive such right in writing, but unless all entitled parties file timely waivers, a hearing will be conducted. Such waivers must be unequivocal and request the Director or Deputy Director, as the case may be, to decide the matter at issue on the materials submitted in subsection (e) (1) of this Section and any stipulations the parties might enter into.

8.3.5.c. When a hearing is waived under the provisions of this subsection, the written record in the case shall be submitted to the Director or Deputy Director, as the case may be, for decision.

8.3.6. Burden of proof. In proceedings under this Series, the operator making application to the Director under subsection 8.1. of this Series shall have the burden of proving his case by a preponderance of the evidence.

8.3.7. Proposed findings, conclusions and orders. The Director or Deputy Director, as the case may be, may request the submission by parties of the proposed findings of fact, conclusions of law and orders, together with a supporting brief: *Provided*, That such documents shall be submitted within twenty (20) days after their request. Such proposals and briefs shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon.

8.3.8. Hearings to be public. All hearings conducted under Section 8 of this Series shall be open to the public.

8.3.9. Decisions and orders.

8.3.9.a. Within twenty (20) days after conclusion of the hearing and submission of the all documents or after submission of the case and consideration of the record as a whole in the event a hearing is waived, the Director or Deputy Director, as the case may be, shall render a decision and order which shall be in writing and shall include a statement of (a) findings and conclusions, and the reasons or basis therefore on the material issues of fact and law and (b) the appropriate ruling or order granting, granting in part or denying the relief sought.

8.3.9.b. A copy of all decisions and orders shall be served, by certified mail, upon all parties and, unless the decision and/or order provides, the decision and order so served shall become effective immediately following service.